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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-922

CHRYSLER CORPORATION,

Petitioner,

—v.—

JAMES A. SCHLESINGER,
Secretary United States Department of Defense, et al.,

Respondent.

BRIEF OF *AMICUS CURIAE* ORGANIZATION RESOURCES COUNSELORS, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May it Please the Court:

ORGANIZATION RESOURCES COUNSELORS, INC. respectfully submits this brief *Amicus Curiae*. All of the parties to the cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 42.

Interest of *Amicus*

Organization Resources Counselors, Inc. (ORC) is a management firm which provides a wide variety of services to its clients, predominantly in areas involving or impacting

on industrial relations. One very important area of our work is in the area of equal employment opportunity. In this area of endeavor, ORC provides consultation services and expert assistance to many of the nation's largest employers.

In addition, as an element of its services, ORC has, since 1967, provided an opportunity for concerned employers to meet on a regular basis to discuss topical issues affecting the development and implementation of affirmative action requirements. These meetings also provide a means for employers concerned with the effective implementation of affirmative action to exchange ideas and to become better acquainted with the numerous requirements in this area imposed by the variety of state and federal laws. There are over 140 major employers who participate on a regular basis in this aspect of ORC's activities.

The effective implementation of corporate programs in the affirmative action and other areas of industrial relations requires that the consequences of various corporate actions be known and understood by those who implement them. In no area is this as important as in the area of sensitive corporate information which may become public, thereby serving as a means for competitors and others to undermine corporate policies. ORC's work with many of the nation's major employers has demonstrated to us that the misuse of sensitive company information on its utilization of persons protected by equal employment laws can serve to damage the furtherance of equal employment opportunity more than the existence of many more commonly identifiable practices.

Presently there is uncertainty in the types of company information that may be disclosed publicly and the procedures to be applied in disclosure. This legal uncertainty impacts negatively on the development of new and effective

programs to implement the national objectives of equal employment opportunity. Our interest in this case is to have the Court resolve the existing conflicts and uncertainties in the law, thereby providing ORC, its clients, and all other affected parties with a clearer understanding of their rights and obligations.

ARGUMENT

The issues presented in this case should be addressed by the Supreme Court.

(a) There is a growing conflict amongst the Circuit Courts of Appeal concerning the legal issues presented in this case.

There are at least three significant legal issues presented in the instant case which have been the subject of conflict amongst the circuits. Further compounding this conflict, these circuits have set out detailed but clearly contradictory instructions for the direction of the district courts.

The Freedom of Information Act, 5 U.S.C. 552 (hereinafter, "FOIA"), provides for certain exemptions from disclosure. Specifically, subsection (b) (4), 5 U.S.C. 552 (b) (4) indicates that the statute does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In the instant case, the Third Circuit has indicated that even if it is clear that information falls within this exemption, the federal agency which maintains it may still, in its discretion, release such information. The Third Circuit, in its opinion in this case, recognizes that the U.S. Court of Appeals for the Fourth Circuit [1] has adopted a

[1] *Westinghouse Elec. Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom. Brown* v. *Westinghouse Elec. Corp.*, —— U.S. ——, 14 FEP Cases 1686 (1977).

contrary position which mandates that once it has been established that the subject matter information at issue fits within exemption (b) (4), such information may not be released under threat of fine or imprisonment, 18 U.S.C. 1905. The present state of the law is that if a federal agent in Richmond, Virginia releases information which falls within exemption (b) (4) he or she may be jailed and fined, whereas if a counterpart in Philadelphia refuses to release the same information it is possible[2] that his or her federal agency may not only be compelled to release that information, but also pay costs and attorneys' fees incurred by the party seeking such information.[3] In this area of conflict the Third Circuit has noted that the U.S. Circuit Courts of Appeal for the District of Columbia[4] and the Fifth Circuit support its position.[5] Not surprisingly, all of these Circuits rely upon decisions issued by this Court which, they feel, have come "closest" to giving direction on this legal issue.

A second important area of conflict concerns the manner in which this legal issue might be presented to a federal court. The Third Circuit in this case has indicated that the substantive merits of a claim that certain subject matter falls within exemption (b) (4) may not be addressed *de novo* by a federal court, but only after exhaustion of administrative remedies. Conversely, the United States Court of Appeals for the Fourth Circuit has indicated that original jurisdiction does lie in the federal courts[6] and cites to the United States Court of Appeals for the District of Columbia[7] to support its position. The United States Court of Appeals for the Fifth Circuit[8] would appear to side with the Third Circuit on this legal issue but would differ with the Third Circuit concerning the guidelines under which the administrative agency should exercise its discretion initially.[9]

[2] Such a possibility would exist, for example, if it is ultimately determined that disclosure would further the public interest and not impede the discharge of the functions of the Office of Federal Contract Compliance Programs or its compliance review agencies.

[3] Such relief is provided for by the Freedom of Information Act, 5 U.S.C. 552 (a) (4) (E).

[4] *Charles River Park "A" Inc.* v. *Department of HUD*, 519 F. 2d 935 (D.C. Cir. 1975).

[5] *Pennzoil Co.* v. *FPC*, 534 F. 2d 627 (5th Cir. 1975).

The third major conflict between the United States Circuit Court of Appeal is whether the FOIA, or any other statute, establishes standing for a corporation which has submitted data to the federal government under statutory compulsion to contest in federal court the manner in which an administrative agency proposes to release such information to the public. The Third Circuit, in the instant case, has indicated that a corporation has no right under the FOIA to determine or affect how information that it has previously furnished the federal government will be made available to third parties. The Fourth Circuit has recognized such a right under the FOIA.[10] Other circuits, on various statutory grounds, recognize such a right.[11] Whether the right exists under the FOIA, or only under the Administrative Procedure Act, 5 U.S.C. §701 et seq. (hereinafter "APA"), or under some other statutory basis be-

[6] The basis for such holding is 28 U.S.C. §1331.

[7] *Charles River Park "A"* v. *Department of HUD*, *supra*.

[8] *Pennzoil Co.* v. *FPC*, *supra*.

[9] *Comp. Pennzoil Co.* v. *FPC*, 534 F. 2d 627, 632 with *Chrysler Corp.* v. *Schlesinger*, —— F. 2d —— (3rd Cir. 1977) 15 FEP Cases 1218, 1232-1233.

[10] *Westinghouse Elec. Corp.* v. *Schlesinger*, *supra*.

[11] *Charles River Park "A", Inc.* v. *Dept. of HUD*, *supra*; *Westinghouse Elec. Corp.* v. *Schlesinger*, *supra*; *Pennzoil Co.* v. *FPC*, *supra*; *Union Oil Co. of Calif.* v. *FPC*, 542 F. 2d 1036 (9th Cir. 1976).

comes increasingly important. If, for example, the right exists only under the APA, then the right to participate becomes virtually impossible to exercise.[12]

A similar, substantial conflict on all of these issues exists in the United States District Courts. Usage of the FOIA has increased dramatically and has extended not only to the general public, but to direct market competitors,[13] and will, in all likelihood, become increasingly used by labor organizations.[14]

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[12] Provision is made for notice to the contractor when a claim of privilege is made by the contractor at the time it submits its affirmative action program, 41 C.F.R. § 60-60.4 (d), but that provision requires specific reasons to be furnished and related to specific sections of the Affirmative Action Compliance Program ("AACP"). Providing such specificity for every AACP submitted can be very expensive and should only be required once there has been an actual request for AACP data. On the one hand, if the contractor fails to give detailed specificity, and is not entitled to a *de novo* hearing but only a review of the adminstrative record, its administrative case utilizing the APA will be weak. On the other hand, if it does give such detailed information on each occasion when it submits an AACP it may be incurring substantial and unnecessary expense. It is in this context that federal courts have been willing to entertain substantive claims of employers *de novo*. If the employer does not assert the claim of privilege at the time it submits the AACP, then there is no guarantee of its receiving any notice and the right to review under the APA becomes totally ephemeral. *See*, Connolly and Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 46 Fordham L. Rev. 203, 209, footnote 29 (1977).

[13] In *Firestone Tire & Rubber Co.* v. *Kleppe*, No. 76-781-A (E.D. Va. March 11, 1977), the FOIA request to the Department of Interior had been made by General Tire Co.

[14] Ironically there are presently pending actions before the National Labor Relations Board concerning the right of the International Union of Electrical Workers to obtain affirmative action program data from employers, including Westinghouse Electric Corporation. See, *Westinghouse Electric Corp. and I.U.E.*, Case No. 6-CA-7680 and *East Dayton Tool and Die Company and I.U.E.*, Local 668, No. 9-CA-8887. This decision by the Third Circuit in the instant case could possibly obviate that action since such information could be obtained from the contract compliance review agencies. Westinghouse, of course, is headquartered in Pittsburgh.

(b) The existing uncertainty in the law is inhibiting broad innovative approaches to affirmative action programs.

To meet the requirements of E.O. 11246, and to fulfill the national objective of equal employment opportunity, employers who are government contractors[15] have embarked upon novel employment programs. The basic concept of affirmative action, without reverse discrimination, mandates such an approach. Thus, employers will set goals and timetables to improve the participation rate in employment of protected class members and strive to achieve them. Where traditional efforts may not always succeed to achieve these goals, employers often embark upon novel programs to achieve the desired results.

In practice, this system leads to the development of sensitive and volatile data. For example, one of the requirements under existing government regulations is that the contractor identify promotable minorities and females and direct special affirmative action toward these persons to assist them in achieving the targeted positions.[16] Additionally there has developed, as required by other government regulations,[17] internal self audit systems designed to identify problem areas and provide for corrective action. The key element for such programs is frank self-analysis. For such a reason at least one federal district court has found such programs not subject to discovery, even during litigation, and as long ago as 1971.[18]

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[15] There are at least 250,000 such employers who are also government contractors. See, *The Federal Civil Rights Enforcement Effort—A Reassessment, the United States Commission on Civil Rights*, January, 1975, Clearinghouse Publication, p. 27.

[16] OFCCP Revised Order No. 14, Establishing Standard Compliance 41 CFR § 60-60 *et seq.*, Attachment: Standard Compliance Review Report, Part B XII (B) (1) (2).

[17] 41 CFR § 60-2.25.

[18] *Banks* v. *Lockheed Georgia Co.*, 4 EPD (CCH) ¶ 7642 (N.D. Ga. 1971).

Affirmative Action goals have been increased in recent years by many employers to insure that protected class representation in all areas of employment would continue to grow. As a result, the number of special programs has increased. Thus, there are in existence today programs which, for example, (a) provide that a substantial portion of a manager's year-end bonus is calculated based upon achievement of affirmative action program goals and timetables; (b) rate a supervisor's overall performance on the manner in which he or she effectuates the employer's Affirmative Action Compliance Program (hereinafter AAPC); (c) provide special advisory and training programs for protected class members when they are underutilized; (d) provide for self-analysis of employees and supervisors in job performance, including performance toward achievement of AAPC goals and timetables; (e) provide for an "open door" policy to key corporate personnel for all employees who might want to voice equal employment opportunity concerns. Numerous other similar type programs are in use by employers in many areas. These programs not only enhance equal employment opportunity but they strive for equality in achievement, and to overcome educational and environmental disadvantages which might have existed in the general workforce population.

The current uncertainty in the state of the law regarding public disclosure of information and data developed to measure the success or failure of any such innovative programs, often serves to inhibit their development. Legally, employers are required to incorporate the programs, the implementing efforts undertaken, and the persons affected by such programs into the AACP which they are required to submit to the government.[19] Information

[19] 41 CFR § 60-2.13(f).

and data on these programs may include very specific discussion of changes in job structures, corporate responsibility, and critical self-evaluation on both corporate policies and personnel. Similarly, the data developed to measure either successes or failures will often of necessity identify groups of employees, their wage rates, and specific positions within the corporation. The legal requirement mandating submission of this information to the government coupled with the existing uncertainty epitomized by the legal inconsistencies previously indicated will have a chilling effect on worthwhile societal objectives. Moreover, such uncertainty has a more pernicious influence than a ruling from this Court that every program is disclosable. Employers can implement procedures and programs more effectively if they know the consequences of their actions, and can adjust their approaches to specific problems. Uncertainty, however, creates a wait-and-see attitude wherein no one benefits.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted,

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